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## A Midrash on Rabbi Shaffer and Rabbi Trollope

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## A MIDRASH ON RABBI SHAFFER AND RABBI TROLLOPE

*David Luban\**

In this *Propter Honoris Respectum*, I want to begin by quoting from a review that I had the pleasure of writing some years ago of one of Tom Shaffer's books:

Thomas Shaffer is the most unusual, and in many ways the most interesting, contemporary writer on American legal ethics. A lawyer impatient with legalisms and hostile to rights-talk, a moral philosopher who despises moral philosophy, a Christian theologian who refers more often to the rabbis than to the Church Fathers, a former law school dean who is convinced that law schools have failed their students by teaching too much law and too little literature, a traditionalist who wholeheartedly embraces feminism, an apologist for the conservative nineteenth-century gentleman who describes his own politics as "left of center," Shaffer is a complex thinker who, I suspect, takes more than a little pleasure in the contradictions he bestraddles. In any event, Shaffer has produced a series of books and articles on professional ethics written with profundity, gentility, and polemical passion.<sup>1</sup>

All of Shaffer's work that I know (and that is only a small fraction of his dozen books and three hundred articles) could bear the title of one of his most famous books: *On Being a Christian and a Lawyer*.<sup>2</sup> As Shaffer has written elsewhere, "[p]eople show what their morals are by claiming where they come from," and, more briefly, "[b]elonging

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\* Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center. I would like to thank my colleagues who participated with me in a discussion group on Trollope's *Orley Farm*. In addition to participating in the discussion group, Vicki Jackson talked through my ideas with me, and I received valuable comments on an early draft of this Paper from Heidi Li Feldman, Carrie Menkel-Meadow, Nina Pillard, and Mike Seidman.

1 David Luban, *The Legal Ethics of Radical Communitarianism*, 60 TENN. L. REV. 589, 589 (1993).

2 THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981).

explains reality.”<sup>3</sup> Where Shaffer comes from is the “community of the faithful”<sup>4</sup> to which he belongs. Christianity deeply conditions Shaffer’s views of law, lawyers, morals, adversary representation, truth, and community.

To proceed in the spirit of Shaffer’s own dictum, a response to his work should begin by claiming where its author comes from. “An ethic that is not found in a community is not an ethic; it is only somebody’s idea.”<sup>5</sup> The place I begin, therefore, is my membership in an American-Jewish community, and my response will be a Jewish approach to some of Shaffer’s themes. I want to challenge Shaffer’s reading of Anthony Trollope’s novel *Orley Farm*, along with the views of law and lawyers he finds in the novel, and challenge it from a specifically Jewish perspective.<sup>6</sup>

Saying that I speak from within an American-Jewish community is not specific enough, however, because there are many Jewish communities, and all of them are famously fractious.<sup>7</sup> A story gives the idea: A religious Jew is cast away on an island and rescued ten years later. His rescuers notice that he has fashioned two splendid buildings, lovingly assembled of driftwood and stone and bamboo, and elaborately decorated with stones and shells of many colors. They ask him what the buildings are. “Oh, they’re synagogues,” he replies. “But why are there two of them?” He points at the nearer of the two. “That one I pray in.” Then he points at the other. “And that one I wouldn’t go near.” Or, in the words of an old saying: two Jews, three opinions.

Very well, then. I begin from the community of Jews who have departed from orthodoxy, but who persevere in the hard upstream swim to the ancestral identity, which we would be devastated to lose; of Jews who consider ourselves political progressives and ethical cosmopolitans; and of Jews who dislike the narrow parochialism and downright jingoism of some Jewish communities, but who secretly fear that without these traits the Jews might disappear (one Jew, two opinions). I suspect that we are not a small community.

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3 THOMAS L. SHAFFER WITH MARY L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 25, 28 (1991).

4 *Id.* at 201.

5 *Id.* at 130 n.4.

6 Shaffer analyzes *Orley Farm* in SHAFFER, *supra* note 2, at 45–57, 81–91, and again in SHAFFER & SHAFFER, *supra* note 3, 88–93.

7 Rabbi Arthur Hertzberg believes that fractiousness is one of the defining characteristics of the Jews as a people. See ARTHUR HERTZBERG & ARON HIRT-MANHEIMER, *Jews: The Essence and Character of a People* 33–40 (1998). On the fractiousness of contemporary American Jews, and the struggle over Jewish identity, see generally SAMUEL G. FREEDMAN, *Jew vs. Jew: The Struggle for the Soul of American Jewry* (2000).

I. TROLLOPE'S *ORLEY FARM*

Why *Orley Farm*? Quite simply, it is a great novel about legal ethics, and Shaffer has drawn large conclusions from it about his themes of law, lawyers, morals, adversary representation, truth, and community. I begin by quoting Shaffer's own summary of its plot:

*Orley Farm* is the story of a guilty woman, Lady Mary Mason, who has forged what appears to be a codicil to the will of her dying husband, Sir Joseph Mason. She has done this twenty years before the novel begins. The codicil has been proved, in litigation, through Lady Mason's testimony. As a result, her son Lucius is in possession of the devise at issue, Orley Farm. Sir Joseph's eldest son, Joseph Mason, has been cheated out of the farm. He is a child of Sir Joseph by a former marriage; Lucius is Lady Mason's only child. Her forgery is like the misdeed of the biblical Rebekah; she has acted dishonestly to benefit her child.

A scheming and vengeful solicitor named Dockwrath has, as he believes, been mistreated by Lucius. Dockwrath sets out to prove the forgery from old documents which will show how Lady Mason got through the will contest. What she did was this: On the day the codicil was supposedly executed the witnesses to it signed another document for Sir Joseph—a partnership deed. Lady Mason gave the codicil that same date; the witnesses to the deed thought (and testified) that what they signed was the codicil. Dockwrath produces the partnership deed and the aging witnesses, and the witnesses are prepared to say that they signed only one paper. Dockwrath succeeds in getting Joseph Mason and his respectable London lawyers to agree to prosecute Lady Mason for perjury, based on her testimony in the will contest. That is the suspense in the story. Trollope thought it was his best plot in forty-seven novels.<sup>8</sup>

So far, so good. However, Shaffer's lucid plot summary is incomplete. He omits one important feature of the plot, without which I think we cannot understand the moral situation in its richness. That feature is the circumstance that led Lady Mason to her crime.

Sir Joseph Mason was a very wealthy man, and Orley Farm—"a small country house"<sup>9</sup>—is only a small portion of Sir Joseph's estate. Sir Joseph's actual will provided small incomes for Lady Mason and Lucius, but he left everything else, including Orley Farm and a far larger estate at Groby Park, to his eldest son Joseph, Lucius's half-brother.<sup>10</sup> The codicil that Lady Mason forged made just one change

<sup>8</sup> SHAFFER, *supra* note 2, at 45–46.

<sup>9</sup> 1 ANTHONY TROLLOPE, *ORLEY FARM* 2 (Dover Publ'ns, Inc. 1981) (1862).

<sup>10</sup> 1 *id.* at 1–2.

in these devises. Lady Mason was a clever forger—she knew enough not to be greedy, and her codicil awarded Lucius only one additional prize, namely the modest farm (Orley Farm) on which she and Lucius were already living.<sup>11</sup> The insignificant amount of the loss does not mollify Joseph Mason, however. For twenty years, he has seethed with bitter resentment that he did not get everything. When we first meet him, Trollope describes him as “a bad man in that he could never forget and never forgive. . . . He was a man who considered that it behoved him as a man to resent all injuries, and to have his pound of flesh in all cases.”<sup>12</sup> As Trollope reminds us several times, Mason’s only regret at the prospect of seeing Lady Mason imprisoned is that he would prefer to see her hanged.<sup>13</sup> As the novel progresses, we watch his hatred of Lady Mason grow and devour him, and by the time it ends, nothing remains of Joseph Mason except his hatred, tempered by a small, redeeming smidgen of rational self-interest. Shaffer does not mention any of this; later, we will see why this omission is important.<sup>14</sup>

The story of the litigation is not all there is to the plot, of course. Trollope also provides a large cast of supporting characters with designs of their own, no fewer than six love triangles, and a number of set-piece genre scenes—over six hundred vastly entertaining pages. I will bring in other bits of the plot as we need them.

*Orley Farm* has plenty of lawyers in its cast in addition to the vindictive Dockwrath. Most significant among them is Thomas Furnival, Lady Mason’s attorney in the earlier litigation over the authenticity of the will, and her principal legal advisor in the perjury litigation. As Furnival becomes increasingly convinced that Lady Mason is in serious trouble, he brings in two skilled gutter-fighter criminal defense lawyers, the barrister Chaffanbrass and the attorney Solomon Aram. To this legal team Furnival adds Felix Graham, a young barrister who is also the romantic lead in the novel. On the other side we meet the respected London firm of Round and Crook, with its elder partner Round, who opposed Furnival in the will litigation twenty years past, and his son Matt Round, who handles the prosecution case for Joseph Mason against Lady Mason. There are other lawyers as well, but these are the most important.

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11 1 *id.* at 2–4.

12 1 *id.* at 49.

13 1 *id.* at 61.

14 See *infra* Part VIII.

II. THE LEGAL ETHICS PROBLEM IN *ORLEY FARM*

A legal ethics problem lies at the heart of *Orley Farm*. The main legal protagonist is Furnival, and his difficulty is this. When Lady Mason first learns that Dockwrath is trying to revive the old litigation against her, she turns to Furnival for advice.<sup>15</sup> Much as he would like to believe Lady Mason is innocent, Furnival suspects immediately that she is not, and that the victory he won twenty years earlier on her behalf was achieved through falsehood—a thought he entertained at that time, but then repressed.<sup>16</sup> Yet Furnival does not want to believe Lady Mason's guilt—in part because (without admitting it to himself) he is infatuated with Lady Mason, but also because he fears that he will not be able to muster adequate professional zeal on her behalf unless he thinks her innocent. Trollope is at his keenest unfolding the delicate games with belief and truth that Furnival plays against himself, holding at arm's length his steadily growing certainty that Lady Mason is guilty, and masking from himself the understanding that that is what he is doing.

Throughout the novel, Furnival never doubts that Lady Mason will be acquitted of criminal charges, because he knows that jurors will find her appealing and will perceive that her persecutors are revolting. The ticklish issue is what should be done about the ill-gotten Orley Farm. Even if she is acquitted, should not the farm be returned to Joseph Mason, its rightful owner? Lucius Mason poses an obstacle to any effort to return Orley Farm. Furnival knows that Lucius has no suspicion that his mother is really the forger that her enemies say she is. Control of the farm passed to him when he turned twenty one, and if it is to be returned to Joseph Mason, Lucius is the one who will have to sign it over. An even more important obstacle is that returning the farm before the trial would be damning evidence of Lady Mason's guilt. Furnival realizes that if he ever tells Lady Mason that he thinks she is guilty, she will very likely confess to him—and if she confesses, he will have no alternative except instructing her to return the farm regardless of whether that leads to her perjury conviction. So Furnival has to enter into a conspiracy of silence with Lady Mason. Even when he becomes certain of her guilt, he never tells her what he believes; and even when she becomes certain that he thinks her guilty, she never lets him know that she has guessed his mind.<sup>17</sup>

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15 2 Trollope, *supra* note 9, at 89–96.

16 1 *id.* at 93.

17 2 *id.* at 101 (“And then—for the first time—she felt sure that Mr. Furnival had guessed her secret. He also knew it, but it would not suit him that any one should know that he knew it!”).

Furnival is an extremely good lawyer—good enough to understand (as every good white-collar defender understands today) that legal victory by itself will not save his client unless he also acquits her in the eyes of her community. His conclusion is straightforward: the only successful outcome for Lady Mason is acquittal on the perjury charge *and* keeping her guilty secret from everyone, including Lucius. The result for Furnival is an intricate slalom around the truth, a struggle to know the truth while not knowing it—a struggle of a kind that every successful criminal lawyer will recognize instantly.

Shaffer rightly notes that Trollope carefully situates Furnival between two lawyerly extremes.<sup>18</sup> On the one side is young Felix Graham, who holds the unusual view that lawyers should never disserve the truth, and, therefore, should represent only the truthful side in a case. (Not surprisingly, Graham's fledgling career as a barrister is going nowhere.) On the other side are the hardened Old Bailey warriors Aram and Chaffanbrass, who never need to ask whether their clients are guilty, because they assume that if their services are required the client must be guilty.<sup>19</sup> Furnival is neither self-righteous like Graham (equal parts self-absorbed and righteous) nor is he, like Chaffanbrass, a "Pharisee" (Shaffer's word, and, I will shortly suggest, a word fraught with significance).<sup>20</sup> Instead, Furnival is—as Shaffer elaborately argues in *American Lawyers and Their Communities*—a gentleman.<sup>21</sup> As a gentleman, he wants to defend the weak (for that is how Furnival wrongly perceives Lady Mason). He also wants to do so with honor. The outcome Furnival desires—acquitting Lady Mason and restoring her to her community, which as a practical matter requires her to keep Orley Farm and perpetuate her twenty-year old lie—dictates that he, Furnival, play hide-and-seek with the truth. He hides, and he hopes that the truth will not seek him out. He understands all too well that the alternative to perpetuating the lie is disaster—Lady Mason disgraced, exiled, turned out of her home, and perhaps jailed; her son, disinherited and very likely estranged from his own mother. And for what? So that a very rich, very hateful man, Joseph Mason, who inherited almost all of his father's estate, will now have the last piece of it, along with his vengeance against Lady Mason.

Let me repeat the conclusion: because Furnival is a gentleman, he desires above all to save Lady Mason from a great deal of suffering. Because he is a man of honor, he hides, from himself and from

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18 SHAFER, *supra* note 2, at 48–49.

19 *Id.* at 49.

20 *Id.*

21 SHAFER & SHAFER, *supra* note 3, at 88–94.

others, for as long as he can, the lie that he is perpetuating. He perpetuates the lie to avert the far greater wrong of Lady Mason's destruction at the hands of Dockwrath and Joseph Mason.

### III. SHAFFER'S LEGAL ETHICS: THE ADVOCATE ON THE CROSS

So far, I have largely followed Shaffer's reading of *Orley Farm*, in particular his keen understanding of Furnival's dilemma and his penetrating insight that Furnival's dilemma arises out of the ethics of the gentleman-lawyer. Shaffer draws far more from *Orley Farm* than this, however. For him, the significant counterpoint to Furnival is neither Graham nor Chaffanbrass and Aram. Rather, it is Lady Mason's friend Edith Orme.<sup>22</sup> Although she is not a lawyer, Mrs. Orme ministers to Lady Mason in a way that Furnival cannot bring himself to do, and that makes her a better lawyer than Furnival. The reason takes us into the deepest portion of Shaffer's vision of what it is to be a Christian and a lawyer. It is to be like Mrs. Orme.

For Shaffer, the Christian answer to the commonly-asked question of how a lawyer can serve the guilty is that Jesus served the guilty.<sup>23</sup> Christ's ministry brought him into the company of disreputable people and despised people—into the company of sinners, prostitutes, tax collectors, publicans, and thieves. It had to: a physician practices among the sick, not the healthy.

But it must not be supposed that Shaffer is offering an easy excuse to the criminal lawyer, the facile reply that if representing the guilty is good enough for Jesus, it is good enough for me. That would be a short and sweet way out of moral accountability for lawyers' decisions about who to represent. Nothing could be further from Shaffer's intentions, because what Shaffer is talking about is not legal representation but ministry, and ministry is a perilous profession that offers no shield against moral accountability. Quite the contrary: "When Jesus touched the leper, Jesus became a leper."<sup>24</sup> Ministry requires a kind of faithfulness to the other person that knows no circumscription, no limit-point. Ministry may, in the end, bring you to Calvary. Shaffer could hardly be more blunt, or more terrifying:

The scene to superimpose on the jail cells where we talk to the guilty is Jesus and the tax-gatherers. The scene to superimpose on the frightful image of my client receiving his punishment is Dismas

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22 *Id.* at 88–89.

23 See SHAFFER, *supra* note 2, at 55–56.

24 *Id.* at 52.



on the cross, Dismas with an advocate and a companion hanging by his side.<sup>25</sup>

The advocate hanging on the cross beside the thief is, to say the least, a far cry from the old trial lawyer's cynical advice to make sure you are on the outside when the jail door closes on your client.

Shaffer raises the stakes in legal ethics to an almost unimaginable degree. In his hands, it becomes a different subject, "a turn away from analysis of duty and consequence, of critical moments and 'ethical dilemmas' and *statements* and dry rationality."<sup>26</sup> The moral requirements of faithful ministry replace the entire dispiriting casuistry of the *Model Rules of Professional Conduct* and "public policy" that make up so much of our legal ethics discourse. Gone, too, is the liberal-secular discourse about the public interest and justified rule breaking. For Shaffer, rules and policy have nothing to do with what matters, the I-Thou relationship between lawyer and client.<sup>27</sup> I read Shaffer's language about the thief on the cross with his advocate hanging by his side quite seriously and literally. It means, I think, that if ministering to the client requires a lawyer to break a Model Rule, or a law, and undergo punishment for it, then the Christian who is a lawyer will break the Model Rule and the law—not because doing so is in the larger public interest, but because doing so is what faithful ministry demands. Rejecting arguments based on "the Constitution or the adversary function" about how a lawyer should treat client perjury, Shaffer comments, "a moral person cannot allow either the government or the profession to decide what is truth and what is not."<sup>28</sup> Sometimes, good people and good lawyers tell lies.<sup>29</sup>

Of course, Shaffer is not presenting a "win at all costs" ethic—far from it. In the authentic I-Thou relationship, the lawyer "may have to refuse to go further with the client,"<sup>30</sup> and refusing to go further might itself violate rules and laws under some circumstances—for example, if the lawyer finds himself morally compelled to reveal privileged information. Shaffer distinguishes between loyalty to the client, which is what the win-at-all-costs ethic demands, and fidelity, which is deeper and riskier, and which may take both the lawyer and the client to places where they would prefer not to go.<sup>31</sup>

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25 *Id.* at 79.

26 Thomas L. Shaffer, *On Lying for Clients*, 71 NOTRE DAME L. REV. 195, 195 (1996).

27 *See* SHAFFER, *supra* note 2, at 28–32.

28 *Id.* at 102.

29 Shaffer, *supra* note 26, at 205.

30 SHAFFER, *supra* note 2, at 29; *see also id.* at 104.

31 *See id.* at 87–91.

## IV. EDITH ORME'S MINISTRY

Edith Orme takes Lady Mason to places where she would prefer not to go. The crucial scenes in *Orley Farm* are Mrs. Orme's conversations with Lady Mason after she learns the truth about Lady Mason's crime, the scenes in which "they sat together for hours and hours, they spoke and argued, and lived together as though they were equal."<sup>32</sup> Mrs. Orme's concern is, above all else, with the state of Lady Mason's soul. She herself forgives Lady Mason,<sup>33</sup> and she hopes that Lady Mason will be acquitted at her trial—but forgiving her and hoping for legal acquittal do not mean accepting her crime. Mrs. Orme never wavers from her purpose: to support Lady Mason through her travails, but also to bring her to repent her sin. Mrs. Orme is a true Christian—in Trollope's typical wry understatement, "a good churchwoman but not strong, individually, in points of doctrine. All that she left mainly to the woman's conscience and her own dealings with her Saviour . . . ."<sup>34</sup>

Mrs. Orme believes that repentance requires renouncing the crime, and that will include giving Orley Farm back to Joseph Mason. Lady Mason will have to confess everything to Lucius, for the farm belongs to Lucius now, and the law makes him the one who will have to renounce it. For her own part, Lady Mason can bear any pain except the pain of confessing to Lucius. Through hour after excruciating hour, Mrs. Orme gently insists that Lady Mason must place herself in the hands of her Savior, for the sake of her soul.<sup>35</sup> Above all, she must tell Lucius the truth and have faith that Lucius will forgive her. The more Mrs. Orme insists, the more the increasingly distraught Lady Mason resists. Better death than the scorn of her son, the first creature she had ever loved, and still the creature she loves the best. The contest between the two friends is remarkable. "Lady Mason was greater than [Mrs. Orme] in force of character,—a stronger woman in every way, endowed with more force of will, with more power of mind, with greater energy, and a swifter flow of words."<sup>36</sup> But in the end, Mrs. Orme—"the weaker, softer, and better woman"<sup>37</sup>—prevails.

The outcome is not what Mrs. Orme had hoped. The stunned Lucius does give back Orley Farm, but he never forgives his mother, and eventually he emigrates to Australia and abandons her in exile in

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32 2 TROLLOPE, *supra* note 9, at 178.

33 2 *id.* at 41.

34 2 *id.*

35 2 *id.* at 153–60.

36 2 *id.* at 155.

37 2 *id.* at 153.

Germany.<sup>38</sup> At the end of the novel, Trollope expresses pious hopes that God will someday allow life to smile on Lady Mason again, “for no lesson is truer than that which teaches us to believe that God does temper the wind to the shorn lamb.”<sup>39</sup> But his show of piety is surely ironic, even disingenuous, because he deliberately offers the reader nothing beyond it. If Lady Mason’s life ended better than the bleak desolation in which we leave her, it was within Trollope’s power to tell his readers about it, which he refuses to do. At the point where Trollope breaks off Lady Mason’s story, she remains in unalloyed misery.

But to Shaffer, none of this implies that Mrs. Orme made a mistake. Christians know that it is impossible “to make things come out right, without suffering.”<sup>40</sup> That is how Mrs. Orme, representing Christianity, contrasts with Mr. Furnival, representing only the ethic of the gentleman:

[T]he gentleman had become merely optimistic . . . where the faithful Jew or Christian was hopeful: Hope is optimism that is truthful. It rejoices in the truth. When it comes to the gentleman’s ethic, the virtue of hope can come to terms with and deal truthfully with the certainty that the moral life will cause others to suffer. Hope, which says that the Ruler of the Universe is in charge, that fate is finally benign, also says that the harm that may come to others is not an argument against taking a moral direction. It was hope that caused Mrs. Orme to advise Lady Mason to tell the truth, as it was mere optimism that led Thomas Furnival to use his lawyer’s skill to keep her from telling the truth. . . . He wants too much for things to come out right.<sup>41</sup>

## V. INTRODUCING REBEKAH

I have presented Shaffer’s approach to *Orley Farm* in what I hope is a sympathetic and accurate way. But there is much about its moral position that troubles me and much about his reading of the novel that does not ring true.

Let me return to Shaffer’s summary of *Orley Farm*’s plot, quoted above.<sup>42</sup> I want to take issue with its very first phrase, “*Orley Farm* is the story of a guilty woman.”<sup>43</sup> A few pages later he echoes and expands this judgment: “The guilty are repulsive. Lady Mason, as pretty and respectable as she is, comes to be repulsive to everyone in the story,

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38 2 *id.* at 320.

39 2 *id.* at 312.

40 See SHAFFER & SHAFFER, *supra* note 3, at 90.

41 *Id.* at 90–91.

42 See *supra* note 8.

43 SHAFFER, *supra* note 2, at 45.

even to herself.”<sup>44</sup> These ideas form the theme of a chapter in *On Being a Christian and a Lawyer*, entitled “The Problem of Revulsion,” which uses *Orley Farm* to raise the question of how lawyers should come to terms with the revulsion they feel for their guilty clients.

The trouble with Shaffer’s reading is that Lady Mason is *not* a repulsive figure. On the contrary, she is from start to finish the most attractive character in the novel, and I for one have no doubt that Trollope fully intended her to be. As Trollope writes at the end of the book,

I may, perhaps, be thought to owe an apology to my readers in that I have asked their sympathy for a woman who had so sinned as to have placed her beyond the general sympathy of the world at large. If so, I tender my apology, and perhaps feel that I should confess a fault. But as I have told her story that sympathy has grown upon myself till I have learned to forgive her, and to feel that I too could have regarded her as a friend.<sup>45</sup>

The final sentence is ironic Trollopean understatement. Trollope knows full well that he has given us a great fictional heroine and made her sympathetic from the very first page. He lets us know it at the outset, in further ironic understatement: “[P]ersistent novel readers . . . will probably be aware that she is not intended to be the heroine. The heroine, so called, must by a certain fixed law be young and marriageable.”<sup>46</sup> Which is to say: *Of course* Lady Mason is the heroine. (None of the three young and marriageable ladies in *Orley Farm* comes within hailing distance of being a heroine.) Lady Mason is “the chief interest of our tale.”<sup>47</sup>

From the moment we meet her, Trollope dwells on Lady Mason’s attractions, and I think that Shaffer trivializes them when he describes her only as “pretty and respectable.”<sup>48</sup> She is, to be sure, “tall and comely,”<sup>49</sup> and her widowed life before the novel begins was “successful . . . prudent and well conducted.”<sup>50</sup> But, in addition, she is “a woman of no ordinary power,” with “considerable mental faculties”<sup>51</sup>—and much more than that.

The quietness and repose of her manner suited her years and her position; age had given fulness to her tall form; and the habitual

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44 *Id.* at 49.

45 2 TROLLOPE, *supra* note 9, at 312.

46 1 *id.* at 10.

47 2 *id.* at 312.

48 SHAFFER, *supra* note 2, at 49.

49 1 TROLLOPE, *supra* note 9, at 14.

50 1 *id.*

51 1 *id.*

sadness of her countenance was in fair accordance with her condition and character. And yet she was not really sad,—at least so said those who knew her. The melancholy was in her face rather than in her character, which was full of energy,—if energy may be quiet as well as assured and constant.<sup>52</sup>

At the moment of Lady Mason's greatest travail, Trollope describes her thus: "She was a woman who with a good cause might have dared anything. With the worst cause that a woman could well have, she had dared and endured very much."<sup>53</sup> And later: "There was much that was wonderful about this woman."<sup>54</sup>

When we first get to know her, Lady Mason has become aware that trouble is brewing, and Trollope shows her thinking her way through her problems. He makes it a pleasure for us to watch her in action, for her intelligence, her judgment of other people, and her sense of strategy are nearly infallible. (Indeed, one of the key elements of the plot—her estrangement from her son Lucius—arises because Lady Mason rightly senses that Lucius's own judgment was too poor for her to confide in him.) She takes steps to make allies of the local gentry, Sir Peregrine Orme and his daughter-in-law Edith. First, strategically, she approaches Sir Peregrine for advice about a different, lesser matter—the bad judgment of her son—and then circles around to what is really on her mind, the legal troubles that Dockwraith is contriving for her.<sup>55</sup> She asks Sir Peregrine's advice about whether to see a lawyer; even though he advises her not to, she does anyway.<sup>56</sup> Lady Mason understands that Sir Peregrine is an innocent, who naively assumes that when you are in the right the courts will inevitably vindicate you.<sup>57</sup> We quickly come to understand that Lady Mason was not really after Sir Peregrine's advice. She solicited it in order to win him over to her cause. Next, very deliberately, she campaigns to enlist Thomas Furnival, her lawyer of twenty years ago, as an ally.<sup>58</sup> This she accomplishes by a show of feminine weakness that stops properly short of flirtation, but that (as she well knows) Furnival

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52 1 *id.* at 15.

53 2 *id.* at 35.

54 2 *id.* at 179.

55 1 *id.* at 30–34.

56 1 *id.* at 35.

57 "An English judge and an English jury were to him the Palladium of discerning truth. In an English court of law such a matter could not remain dark." 2 *id.* at 122. "Poor Sir Peregrine! His innocence in this respect was perhaps beautiful, but it was very simple." 2 *id.* at 125. Lady Mason understands that "Sir Peregrine's friendship was more valuable to her than that of Mr. Furnival, but a word of advice from Mr. Furnival was worth all the spoken wisdom of the baronet, ten times over." 1 *id.* at 91.

58 1 *id.* at 91–96.

finds irresistible. Step by masterful step, Lady Mason does everything in her power to recruit allies and avert the catastrophe. She holds only a few good cards in her hand, but she plays them flawlessly.

All this makes Lady Mason sound ruthlessly manipulative, but throughout the novel Trollope takes great pains to show us otherwise. She is never *merely* strategic; and, while she has ulterior motives for all her moves, she never uses her friends *merely* as means to an end. She genuinely loves them, and she never abuses their trust.<sup>59</sup> In fact, the great crisis of the novel occurs when Sir Peregrine falls in love with Lady Mason and asks her to marry him. Lady Mason realizes that in order to save him from a disgraceful marriage to a woman who may well be doomed, she has to confess her crime to the hitherto-unsuspecting Sir Peregrine. She does so, knowing that by doing so she is unraveling all her plans and bringing inescapable ruin on herself. Trollope's chapter-title—"Showing How Lady Mason Could Be Very Noble"—is clearly *not* ironic. Shaffer thinks that as the novel proceeds she "comes to be repulsive,"<sup>60</sup> but I do not see it. Even at the end, Sir Peregrine loves her and wants to marry her,<sup>61</sup> and I imagine that most readers are rooting for a storybook ending in which they marry and live happily ever after. Trollope could easily have written a novel in which, to cover up her crime, Lady Mason had to commit new misdeeds and betrayals, and make herself—in Shaffer's word—repulsive. But that is not the book Trollope wrote. Nothing blemishes Lady Mason except the twenty-year-old crime she committed before the book begins.

Even that crime she committed for the sake of Lucius, not for herself. In one of the crucial chapters of the book, "What Rebekah Did For Her Son," Lady Mason debates her crime with Mrs. Orme:

"What did Rebekah do, Mrs. Orme? Did she not do worse; and did it not all go well with her? Why should my boy be an Ishmael? Why should I be treated as the bondwoman, and see my little one perish of thirst in this world's wilderness?"

"No Saviour had lived and died for the world in those days," said Mrs. Orme.

"And no Saviour had lived and died for me," said the wretched woman, almost shrieking in her despair.<sup>62</sup>

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59 See 2 *id.* at 178 ("[C]ould she have shown her love by any great deed, there was nothing which Lady Mason would not have done for Mrs. Orme.").

60 SHAFFER, *supra* note 2, at 49.

61 2 TROLLOPE, *supra* note 9, at 307.

62 2 *id.* at 158.

Actually, Lady Mason has performed a double self-identification, as Rebekah but also as Sarah—for it was Sarah who caused her bondswoman Hagar to be driven into the wilderness with her son Ishmael.<sup>63</sup>

Twice more, Trollope repeats the identification Lady Mason with Rebekah: “She remembered Rebekah, and with the cunning of a second Rebekah she filched a world’s blessing for her baby.”<sup>64</sup> And, more elaborately:

As Rebekah had deceived her lord and robbed Esau, the first-born, of his birthright, so had she robbed him who was as Esau to her. How often had she thought of that, while her conscience was pleading hard against her! Had it been imputed as a crime to Rebekah that she had loved her own son well, and loving him had put a crown upon his head by means of her matchless guile? Did she love Lucius, her babe, less than Rebekah had loved Jacob? And had she not striven with the old man, struggling that she might do this just thing without injustice, till in his anger he had thrust her from him. “I will not break my promise for the brat,” the old man had said;—and then she did the deed.<sup>65</sup>

On my reading, these scenes and identifications are the keys that unlock *Orley Farm*. To see why, we will have to do some biblical delving.

## VI. HOW THE HEBREW BIBLE UNDERMINES PRIMOGENITURE

Rebekah, remember, wants her favorite son Jacob to get Isaac’s paternal blessing rather than his elder brother Esau. So she tricks the blind Isaac into thinking that Jacob is really Esau, by placing kid-skin on his hands and neck so that the smooth-skinned Jacob would feel like his hairy brother.<sup>66</sup> Jacob has already talked Esau into selling his birthright,<sup>67</sup> and, assisted by Rebekah’s matchless guile (to use Trollope’s words), Jacob completely supplants Esau.<sup>68</sup>

What attitude should a Jewish reader have toward Jacob and Rebekah—or, for that matter, toward Sarah, who drives Ishmael and Hagar into the desert, to suffer a terrible death for all she knows, so that Ishmael’s younger half-brother Isaac can inherit the legacy of

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63 *Genesis* 21:9–:21.

64 2 TROLLOPE, *supra* note 9, at 311.

65 2 *id.* at 275.

66 *Genesis* 27.

67 *Genesis* 25:29–:34.

68 *Genesis* 27:19–:37.

Abraham?<sup>69</sup> Both are stories in which mothers defeat the law of primogeniture to capture an inheritance for their sons—precisely Lady Mason’s crime. The Torah tells both Rebekah’s and Sarah’s tales without any comment or any redeeming narrative to moralize and sugar-coat them. Yet to a Jewish reader, Rebekah, Jacob, and Sarah cannot be mere criminals. These are the patriarchs and the matriarchs, and God endorses their actions. Their story is the story of Jewish origin, the explanation of how God’s covenant and God’s Torah passed to the children of Israel. Their story is *our* story.

Nothing is more central to Jewish identity than the connection to history, the braiding of what I do today into the many-stranded cable of Jewish deeds and observance running unbroken back into time. Jewish ritual takes care to bind us to the biblical stories in the most powerful and immediate way possible. At the Passover Seder, we are told to regard ourselves as though we have been personally rescued from slavery in Egypt. *Then is now.*

The stories of the patriarchs and matriarchs stand, mythically at least, at the beginning of the cable. The centerpiece and core of every Jewish service is a silent meditation called the Eighteen Blessings (Shemoneh Esrei). It is almost two thousand years old, and the Talmud calls it simply Tefilah, “the prayer.”<sup>70</sup> The worshiper stands up, takes three steps forward—symbolically walking into the divine presence—and, bowing, begins the first blessing, the *avot*, the invocation of the ancestors. “Blessed are You, Hashem our God and the God of our forefathers, God of Abraham, God of Isaac, and God of Jacob.” The gender-egalitarian Conservative and Reform liturgies add the *imahot*, the invocation of the mothers—“God of Sarah, God of Rebekah, God of Rachel, and God of Leah.” Repeated three times a day by observant Jews, the *avot* and the *imahot* are the fountainheads from which all the remaining blessings and supplications in the prayer flow. Before asking anything else, we first let God know that we remember who we are and who we came from.

That makes stories of ancestral transgression problematic and complex. Of course, the stories of Rebekah and Sarah are hardly the only places where our national epic displays our ancestors as morally flawed human beings. Some readers, I suppose, are repelled by the weakness and occasional infamy of our ancestors, memorably scattered throughout the pages of the Hebrew Bible. The rabbis obvi-

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69 Sarah says to Abraham, “Cast out that slave-woman and her son, for the son of that slave shall not share in the inheritance with my son Isaac.” *Genesis* 21:10. Earlier, Sarah had mistreated Hagar, Ishmael’s mother, out of rivalry. *Genesis* 16:5–9.

70 TALMUD BAVLI (BABYLONIAN TALMUD), TRACTATE BERACHOS \*26b.



ously found it troubling, and the medieval commentary literature is full of interpretations explaining it away—explaining, for example, why Esau and Ishmael deserved to be disinherited.<sup>71</sup> I, on the other hand, am filled with awe and admiration at a national epic that so dispassionately exhibits the founding heroes as flawed human beings, rather than infallible demi-gods or pillars of righteousness.

But the story of Rebekah, like that of Sarah, does more than exhibit them as flawed human beings. These stories establish that God's covenant with the Jews came about through a series of transgressions of God's own law. For make no mistake—the law of primogeniture, traduced by Sarah and Rebekah, is itself a Deuteronomic commandment:

If a man has two wives, one loved and the other unloved, and both the loved and the unloved have borne him sons, but the first-born is the son of the unloved one—when he wills his property to his sons, he may not treat as first-born the son of the loved one in disregard of the son of the unloved one who is older. Instead, he must accept the first-born, the son of the unloved one, and allot to him a double portion of all he possesses; since he is the first fruit of his vigor, the birthright is his due.<sup>72</sup>

Although the commandment discusses an unusual special case of succession, it informs us that in normal cases the rule gives eldest sons a double portion as their birthright. And the commandment in the special case is itself troubling because the story of Sarah and Ishmael

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71 Thus, Rashi, the great eleventh-century rabbi who authored the authoritative medieval commentary on the Torah, held that Sarah demanded the expulsion of Ishmael because Ishmael was committing idolatry, or sexual immorality, or that he planned to murder Isaac with arrows. (Rashi reached these conclusions by examining other biblical passages that use the verb *m'tzacheh*, "playing" or "mocking," which appears in the Hagar/Ishmael story. See Genesis 21:9). THE SAPIRSTEIN EDITION, THE TORAH: WITH RASHI'S COMMENTARY TRANSLATED, ANNOTATED, AND ELUCIDATED: BEREISHIS/GENESIS 221 (R. Yisrael Isser Zvi Herczeg ed., R. Meir Zlotowitz & R. Nosson Scherman trans., 1995). Likewise, Rashi said that on the day Jacob bought Esau's birthright, Esau was returning home from committing murder—and that Abraham died the same day because God did not want Abraham to know that his grandson was a murderer. *Id.* at 279. Rashi's explanation of Rebekah's guile is equally speculative and apologetic. Drawing on Talmudic sources as well as his own creative parsing of the biblical syntax, Rashi argued that Jacob never actually lies to Isaac; that Isaac knows all along that it is Jacob he is blessing, and consents to the substitution; that Jacob wants the birthright only because it includes heightened obligations and not because he wants the property; and that Esau preferred to be quit of the birthright because of the extra obligations. *Id.* at 280, 290–99.

72 *Deuteronomy* 21:15–17.

seems to fit it so closely and violate it so plainly.<sup>73</sup> Yet God Himself ratifies Sarah's demand for the expulsion of Ishmael. God assures Abraham that "it is through Isaac that offspring shall be continued for you."<sup>74</sup> It seems that God ordains and desires the transgression of the law.

But the puzzle runs even deeper than this, for the overthrow of primogeniture and the transmission of divine favor to younger sons over elder forms one of the leitmotifs of the Hebrew Bible. Isaac inherits over Ishmael, and Jacob over Esau. In addition, Joseph prevails over his older brothers, and Moses, "whom the Lord singled out, face to face," is the younger brother of Aaron.<sup>75</sup> For that matter, as Robert Cover points out, God favors Abel over his elder brother Cain, and the human race springs from the third-born Seth.<sup>76</sup> The rise of Solomon to David's throne, like the rise of David to Saul's, and the prophet Samuel's to Eli's high priesthood, all involve a younger man defeating the birthright of an elder son.<sup>77</sup> In each case the younger man is *ish haruach*, the one whom God has invested with the spirit. The story of Rebekah is unique among these antinomian episodes, because she alone overthrows the law through out-and-out fraud. Yet she too is chosen, and Jacob, who God names "Israel," is chosen by God through the instrument of Rebekah's trickery.<sup>78</sup>

On Cover's reading, the legalism of the Bible is set within an anti-legalistic story. "The biblical narratives always retained their subversive force—the memory that divine destiny is not lawful."<sup>79</sup> For it is nothing less than divine destiny that, again and again, chooses against the letter and the spirit of the law of primogeniture. Cover elaborated the point as follows:

To be an inhabitant of the biblical normative world is to understand, first, that the rule of succession can be overturned; second, that it takes a conviction of divine destiny to overturn it; and third,

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<sup>73</sup> Of course, the Deuteronomic commandments are given long after the time of the patriarchs and matriarchs, but the rabbinic tradition never doubts that *Deuteronomy's* version of the birthright codifies rather than overthrows preexisting custom.

<sup>74</sup> *Genesis* 21:12.

<sup>75</sup> *Deuteronomy* 34:10.

<sup>76</sup> See Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 20 (1983). Cover's great essay is reprinted in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95 (Martha Minow et al. eds., 1992).

<sup>77</sup> See Cover, *supra* note 76, at 20–21.

<sup>78</sup> That Jacob is chosen by God is clear from *Genesis* 28:13–:15. Jacob's renaming is in *Genesis* 32:29.

<sup>79</sup> Cover, *supra* note 76, at 24.

that divine destiny is likely to manifest itself precisely in overturning this specific rule.<sup>80</sup>

The story of Jewish origins in the Torah is a story of overthrowing the law for the sake of something higher. If Jewishness is “about” origins, then it is “about” the subversion of law. After all, each of these leitmotif stories, each subversion of primogeniture, is a microcosm of the larger story told in the Hebrew Bible—the story of how the “younger” people, the children of Israel, came to do God’s will by dispossessing the owners of the land of Canaan of their domains. The Torah story *is* the story of the overthrow of primogeniture, writ large.

## VII. THE JEWISH ELEVATION OF SOCIAL JUSTICE OVER PROPERTY LAW

If that story was all the Hebrew Bible contains, the Bible would of course be of surpassing interest to Jews, because it would comprise our national epic. Furthermore, its monotheism would still make it a work of surpassing interest to non-Jews as well. But its moral teaching would be troubling, perhaps more troubling than uplifting. A people who have dispossessed the aboriginal owners of land, and put them to the sword, will no doubt tell a story of self-justification, a story of divine election. Outsiders who read the grim tales of genocide that the Book of Joshua recounts will very likely draw a different conclusion—not that the Jews are worse in this respect than anyone else. Property may not be theft, but it always begins in theft, and every people’s title to their land, traced back far enough, originates in conquest and bloodshed. That is the paradox of property: the law of property protects titles that invariably originated in crimes against the law of property. One might say that that is the point of all the anti-primogeniture stories in the Hebrew Bible.

But the universal moral interest in the Hebrew Bible comes from its second great history: not the story of how the children of Israel took the Promised Land and made it an empire, but the interpretation of its eventual collapse—of the misfortunes and exiles of the Jews. That story, recounted again and again by the prophets, is simple and straightforward: the people became unjust and the wealthy oppressed the poor. Catastrophe overtook the community because God punishes injustice. If the first biblical theme is the divinely-sanctioned overthrow of law, the second is the divinely-sanctioned demand that *this* people be just.

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80 *Id.* at 22.

The core of Jewish ethics lies in the laws of holiness (*kedushim*) in *Leviticus* 19: to love the neighbor as yourself,<sup>81</sup> and to love the stranger as yourself<sup>82</sup>—the law of communitarianism and the law of cosmopolitanism. As the tradition interprets them, these laws center around respecting the dignity of every human being, no matter how poor or humble; and to an astonishing degree, the rabbis elaborated practices for ensuring that the poor should not be humiliated by the rich.<sup>83</sup> Avishai Margalit's recent book *The Decent Society*, which proposes that the hallmark of the decent society is that its institutions do not humiliate anyone, stands proudly as a contribution to the mainstream of Jewish ethics.<sup>84</sup> From the prophets on, Jews have located injustice in oppression born of inequality.<sup>85</sup>

Here is one way to understand how the two basic stories in the Hebrew Bible, the story of ascendancy and the story of catastrophe, interlock: Community *originates* in a mix of lawfulness and transgression, represented in the Hebrew Bible through the overthrow of primogeniture and the inscrutable notion of divine destiny, of chosenness. But community *endures* through justice. Or, as Jews have traditionally combined these two strands of the story, we were chosen by God, but what we were chosen for was not privilege but obligation—the commandments or *mitzvot* to do justice.<sup>86</sup> In the past, God

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81 *Leviticus* 19:18.

82 *Leviticus* 19:34.

83 Representative examples include Maimonides's famous discussion of alms giving, which prefers giving too little money, but graciously, to giving an adequate amount with ill grace, and which praises anonymous giving because it will not shame the recipient. See A MAIMONIDES READER 136–37 (Isadore Twersky ed., 1972) (excerpting MAIMONIDES, MISHNEH TORAH bk. 7, ch. 10, ¶¶ 7–14). Other examples include a series of Talmudic strictures requiring the rich to avoid ostentation during occasions of communal mourning in order to avoid shaming the poor who are also present. Thus, wealthy people bringing gifts of food to the house of a mourner should not bring food on fancy plates, or serve beverages in elegant glasses, because otherwise the poor who are also bringing food to the house of mourning will be shamed. Because the poor often cover the deceased's face, which has been discolored through hard work, the rich must cover the face of their dead as well; and the rich, like the poor, must be transported to their graves in plain coffins. TALMUD BAVLI (BABYLONIAN TALMUD), TRACTATE MO'EH KATAN \*27a to \*27b. Most striking, perhaps, is another Talmudic dictum: that it is better to throw yourself into a fiery furnace than to humiliate someone in public. TALMUD BAVLI (BABYLONIAN TALMUD), TRACTATE BABBA METZIA \*59a.

84 AVISHAI MARGALIT, *THE DECENT SOCIETY* 1 (Naomi Goldblum trans., 1996).

85 It is not inequality itself. In the MISHNEH, SHEMOS RABBAH 31:5, David asks God why He does not create equality, and God replies that if He did, there would be no opportunity to practice kindness and truth.

86 This idea that to receive commandments is the same as receiving favors—that obligations are blessings—is reflected in the otherwise-curious Talmudic dictum that

worked his will through the transgression of the laws of property-succession; in the present, God punishes those who place property above justice.

I phrase it this way to highlight that these complementary strands of the biblical narrative share one thread: an ambivalence, or even skepticism, toward the moral claims of property. And, as we have seen, alongside an exalted regard for the law,<sup>87</sup> the Hebrew Bible expresses an ambivalence about legalism.

I suspect that these deeply-ingrained attitudes account, in part, for the attraction so many Jews feel toward political radicalism and political moralism. It is no secret that a remarkably high proportion of Jews are attracted to progressive causes. How could it be otherwise, when our founding stories are about the divinely-sanctioned subversion of laws that safeguard the rights of property, and our prophets denounce the humiliation of the poor by the rich? It is a remarkable fact that Christian observers, from St. Paul to Hegel, have so often assailed Judaism for its pettifogging legalism—that is what Pharisaism is all about, and the Pharisees were Jews—but have overlooked the powerful strain of anti-legalism, of the subversion of law in the name of justice, that is every Jew's biblical birthright.<sup>88</sup>

#### VIII. THE CASE FOR REBEKAH

This brings us back to the story of Rebekah. Jacob and Esau are twins, and nothing but the accident of birth, the "natural lottery," determines that Esau should inherit the double portion. From Rebekah's point of view, and Jacob's, the law of succession is irrational and perhaps even unjust: it has nothing to do with personal merit, for God Himself has told Rebekah otherwise.<sup>89</sup> Exactly the same thing is true in *Orley Farm*, of course. Trollope presents us with a story in which the law of succession rewards vice over virtue. Joseph Mason, who inherits everything under Sir Joseph's will, is a spiteful, vengeful, baleful, self-righteous prig, and his pathologically tightfisted wife is the most repulsive character in the book. No characters in *Orley Farm* receive a more pitiless treatment from Trollope. Trollope hurls in our face the question: Why do they deserve the estate, and not the

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there is greater moral merit in doing an act out of obligation than in doing it voluntarily. TALMUD BAVLI (BABYLONIAN TALMUD), TRACTATE BABBA KAMMA \*87.

87 See *Deuteronomy* 28 (expressing this regard in the Covenant of the Law).

88 It is Abraham who argues with God about the requirements of justice when God is about to carry out a lawful death sentence against Sodom and Gomorrah—Abraham, who persuades God that carrying out His sentence is unjust. *Genesis* 18:20–32.

89 See *Genesis* 25:23.

estimable Lady Mason and her flawed but essentially decent son? Only because it was Sir Joseph's will to disinherit Lucius, and the laws of England allow him to work his will and disinherit his infant son, "the brat."<sup>90</sup> Trollope lays it on so thick that he practically compels us to consider that in this case the law is unjust. Lady Mason calls her forging of the codicil "justice," and Mrs. Orme agrees that Lady Mason's motive was to remedy "injustice."<sup>91</sup> Furnival's clerk Crabwitz states a more agnostic view that I suspect comes close to Trollope's own: "Who can say what is the justice or the injustice of anything after twenty years of possession?"<sup>92</sup>

For a Jew steeped in the biblical tales, the subversion of the natural lottery and the law that creates it cannot be regarded as unequivocal wrongdoing. It may instead be divinely-ordained, divinely-approved wrongdoing, the working-out of a destiny that is higher than the caprice of the natural lottery. There is nothing just about assigning life-chances on the basis of something as arbitrary as birth order.<sup>93</sup>

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90 2 TROLLOPE, *supra* note 9, at 275.

91 See 2 *id.* at 36 ("When he would not do justice to my baby, when he talked of that other being the head of his house, I did it, with my own hands,—during the night."); see also 2 *id.* at 263 (Mrs. Orme says to Lucius, "Years and years ago, when you were a baby, and when she thought that your father was unjust to you—for your sake,—to remedy that injustice, she did this thing.").

92 1 *id.* at 249.

93 Of course, in *Orley Farm* the disposition of Sir Joseph's estate is the result of his will, not of the rule of primogeniture. But Sir Joseph wrote his will to mimic the effect of primogeniture.

The reason for a rule of primogeniture is based on conservatism, not justice or principle. The argument is that a rule dividing estates equally among the offspring (traditionally, the sons) would prevent the accumulation of large estates because they would be subdivided in every generation. This would make the formation of landed aristocracy impossible. Aristocratic conservatism demands that large estates be kept intact intergenerationally, even at the cost of fairness among the brothers: equality among the brothers is a small sacrifice to gain the salutary inequality among the classes! In societies where the eldest brother customarily assumes the maintenance of his younger siblings, in return for their allegiance, this arrangement would be innocuous. Once that custom breaks down, the result is that propertyless younger brothers are forced to make their way in the world. This they did by entering the military, or the professions, or the clergy, or the ranks of commerce—or, as in the case of Lucius Mason, by emigrating. The result was a social process in which many sons of the landed gentry abandoned their deeply conservative, static world for the dynamic world of modernity and capitalism. As agrarian society gave way to industrial society, the rule of primogeniture thus created the seeds of its own destruction. *Orley Farm* is set at a time in English history when this self-immolation of the aristocracy is well under way.

A Jew, I think, cannot help regarding the crimes of Rebekah as, at least in one way, *rightful* acts, *justified* acts, acts that were supposed to be done. And a Jewish reader of *Orley Farm* will scarcely share Shaffer's censorious response to Lady Mason. We do not see her as unequivocally guilty, and we certainly do not see her as repulsive. Lady Mason is Rebekah, and Rebekah is *our* foremother—resourceful, quick-witted, strong-willed, fiercely protective, unimpressed by the law when the law works injustice. She is a prototypical Jewish mother, ambitious for her child, and—for all we know—elected by God as the instrument of divine destiny. What is the law other than the instrument by which Sir Joseph Mason and his namesake in Groby Park can horde property for the mean-spirited? Why should Rebekah not break it? In Lady Mason's time, no less than Rebekah's, the law gave a woman no legal power over her husband's right to bequeath family property as he saw fit, whether justly or unjustly. To do justice in a man's world, Lady Mason, like Rebekah, has no alternative but to defeat the law. By presenting us with Lady Mason—a woman of enormous depth and energy, hemmed on all sides by a legal and social order that denies women the power to act—and pitting her against the detestable Mason menfolk, Trollope raises the opposition of justice and law in a distinctly feminist form: women's justice against men's law. He raises the opposition, but he declines to resolve it, leaving Lady Mason broken and defeated at the end of the novel, but no less admirable than we first meet her.

Thus, when Shaffer begins by saying "*Orley Farm* is the story of a guilty woman," I think he forecloses an issue that Trollope took pains to leave open. Lady Mason has suffered from qualms of guilt, and there is no doubt that she broke the law. But law breaking may not be real guilt, and although Shaffer says that Lady Mason is not just legally guilty but really guilty,<sup>94</sup> it seems to me that Trollope places that question squarely before us without presuming to answer it.

Now we can see why Shaffer's plot summary of *Orley Farm* is defective. He focused on Lady Mason's crime, but not on Sir Joseph's will and its distributive consequences, nor on the de minimis nature of the injury Lady Mason inflicted on Joseph Mason, nor on the way the law masks and protects moral inequities. Omitting these things, he omitted as well Lady Mason's belief that in committing her crime she was doing justice—and he omitted the materials Trollope offers us that might lead us to agree.

I sometimes wonder whether Shaffer's conviction that Lady Mason is really guilty derives from his conviction that property and its

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94 SHAFER, *supra* note 2, at 57.

inheritance are not things to be trifled with (a conviction that he has occasionally expressed in his writings<sup>95</sup>). I also wonder whether his view has changed over the years, as Shaffer has become more explicitly radical. Recently, he has written,

The most significant countercultural witness for Christians is the moral example of an imprudent itinerant rabbi named Jesus who got himself killed by the government. Consider three radical understandings of Christian moral example left to them by this rabbi. . . . There is, first, an economic reading that subverts all forms of business and of property ownership in favor not of equality, but of distribution to the economic underclass.<sup>96</sup>

This is Shaffer at his point of greatest affinity to the biblical prophets—not only to Jesus, but also to the Hebrew prophets who denounced the oppression of the poor at the hands of those sharing the outlook of Joseph Mason and his wife. It contains no reverence for property, and Shaffer considers reverence for property (like reverence for the legal system and the state) a form of idol-worship.

Even more to the point is Shaffer's 1996 reflection on the story of Rebekah. After first noting that Rebekah is a good person, chosen by God, a source of merit for all Israel, and a prophet, he reflects on the lie she told Isaac to win his blessing for Jacob:

The meaning of Rebekah's lie is the meaning to be found in her life and mission, and that had to do with her life of devotion to her family—all generations of it—a family of families—and to protecting her family both from a harmful person and the harmful rule of law that placed too much power in a first-born son and made irrevocable a father's ill-considered testamentary gesture.<sup>97</sup>

Here, Rabbi Shaffer reads Rebekah's story as a Jew reads it. Shaffer vindicates Rebekah's lie. But, as we ponder his vindication, we might find ourselves reflecting on what an apt description it is, in most respects, of Lady Mason as well.<sup>98</sup>

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95 See, e.g., Thomas L. Shaffer, *Men and Things: The Liberal Bias Against Property*, 57 A.B.A. J. 123 (1971).

96 Thomas L. Shaffer, *Should a Christian Lawyer Sign up for Simon's Practice of Justice?*, 51 STAN. L. REV. 903, 907 (1999).

97 Shaffer, *supra* note 26, at 201.

98 But not in all respects, as Shaffer might object. His point seems to be that Rebekah was acting faithfully toward Isaac as well as Jacob, and it would be a stretch to argue that Lady Mason was acting faithfully toward Sir Joseph. But perhaps it is no less a stretch than Shaffer's belief that Rebekah was acting faithfully toward Isaac.



## IX. THE FAILURE OF MRS. ORME'S MINISTRY

Recall Lady Mason's stunning outburst to Mrs. Orme: "[N]o Saviour had lived and died for me."<sup>99</sup> She places herself outside of Christendom and Christian salvation, and perhaps she does so again, despairingly, when she tells Mrs. Orme, "I do not believe in the thief on the cross . . . ."<sup>100</sup> This should not surprise us. If Lady Mason is Rebekah, and Trollope tells us three times that she is,<sup>101</sup> then Lady Mason is not Christian but Jewish (at least metaphorically). So too is her lawyer Solomon Aram, much to the consternation of Lady Mason's proper Christian supporters. And so too, metaphorically, is her barrister Chaffanbrass. "Mr. Solomon Aram was not . . . a dirty old Jew with a hooked nose and an imperfect pronounciation of English consonants. Mr. Chaffanbrass, the barrister, bore more resemblance to a Jew of that ancient type."<sup>102</sup> (Thanks, Mr. Trollope!) The metaphors are plain enough: In Lady Mason's corner we find Jews. Evidently, Trollope took great pains to establish the Jewish credentials of Lady Mason.

That makes her agonized dialogues with Mrs. Orme a kind of dialogue between Judaism and Christianity, in which Christianity prevails. As we have seen, Shaffer writes from the conviction that Mrs. Orme (unlike Furnival) has done the moral thing in overcoming Lady Mason's resistance; he evidently supposes as well that Trollope shared this conviction. I am not so sure on either count.

After all, if Lady Mason is, like Rebekah, a good person who lied in the service of justice, then why is it so important that she return Orley Farm? To say that the law requires it supposes, as Shaffer usually takes care not to suppose, that our moral reasons come from the law. Merely to presume that keeping Orley Farm is not just illegal but morally wrong begs the question against Rebekah. That leaves just one possibility. If it was important to return Orley Farm, it must be because the well-being of Lady Mason's own soul required her to return the farm. That is what Shaffer believes, and, at her clearest moments, it is obvious that this is what Mrs. Orme deeply believes as well.<sup>103</sup>

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99 2 TROLLOPE, *supra* note 9, at 158.

100 2 *id.* at 238.

101 See *supra* notes 62, 64 & 65.

102 2 TROLLOPE, *supra* note 9, at 100.

103 Mrs. Orme also has her less clear moments. When she opines that depriving another of property is in and of itself "a crime of the very blackest dye," 2 *id.* at 261, she is falling back on the conventional moralism of the gentry rather than responding as a Christian to Lady Mason's sin.

Does the fate of Lady Mason's soul truly depend on whether she returns Orley Farm? The questions of moral psychology here are profound and difficult. Trollope, I have suggested,<sup>104</sup> leaves open the question of whether stealing Orley Farm was a sin. If it was no sin, then it requires no absolution. But matters are not quite so simple, because even if the forgery was the just thing to do, it may well metamorphose into a sin as it works away at Lady Mason over the years. That is what Lady Mason thinks when, on the eve of trial, she finds herself burdened by the terrible consciousness of sin:

She had striven to be true and honest,—true and honest with the exception of that one deed. But that one deed had communicated its poison to her whole life. Truth and honesty—fair, unblemished truth and open-handed, fearless honesty,—had been impossible to her. Before she could be true and honest it would be necessary that she should go back and cleanse herself from the poison of that deed. Men have sinned deep as she had sinned, and, lepers though they have been, they have afterwards been clean. But that task of cleansing oneself is not an easy one;—the waters of that Jordan in which it is needful to wash are scalding hot. The cool neighbouring streams of life's pleasant valleys will by no means suffice.<sup>105</sup>

No wonder that Shaffer comes away with the lesson that it is impossible to make things come out right without suffering.<sup>106</sup>

Two questions arise, however. The first is whether Lady Mason's reflections at this point are *true of her*. Has her one misdeed in fact poisoned her entire life, or are these the momentary despairing thoughts of an exhausted, humiliated, beaten-down woman facing a terrifying trial the next day, while her own best friend is raising the even more terrifying prospect that she must soon be disgraced in the eyes of her own son? This is, after all, no ordinary night. This is Lady Mason's night in Gethsemane.

My answer, hedged with uncertainty, is that Lady Mason's terrible sin-consciousness is *not* true of her, in the sense that it does not represent any essential fact of who she is. On the eve of trial, in hindsight, it appears to her that the die was cast from the very first moment, but that may be an illusion born of despair. It may be illusion as well when, after her ruin, she takes the same view, that from the moment of the forgery her life had been "one incessant struggle to appear before the world as though that deed had not been done. . . . a labour that had been all but unendurable."<sup>107</sup> But earlier,

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104 See *supra* Part VIII.

105 2 TROLLOPE, *supra* note 9, at 181.

106 See SHAFFER & SHAFFER, *supra* note 3, at 90.

107 2 TROLLOPE, *supra* note 9, at 311.

tellingly, Trollope places a very different set of recollections in Lady Mason's mind—that for years she had dwelt in Orley Farm “if not happily at least tranquilly. . . . [H]er guilt had sat so lightly on her shoulders.”<sup>108</sup> This was before her careful plans unraveled. Had circumstances been only slightly different—had, for example, her friend Miriam taken her advice and burned the incriminating papers that Dockwrath eventually discovered, or had Lucius never angered Dockwrath—there is no reason to doubt that Lady Mason's life would have proceeded “if not happily at least tranquilly,” with no slow poison spreading itself through her soul. Her abjection at the novel's end is no truer of her than her earlier tranquility, the “quiet and repose” of her well-conducted widowhood when we first meet her.

The second question is whether her reflections on the eve of trial are *true*—whether telling the truth and enduring the suffering do indeed make things any better. Here, my answer is somewhat more confident. The course of action Lady Mason chose at the behest of Mrs. Orme did *not* make things better for her and did *not* relieve her soul.

We learn this at the novel's end. At this point, Lady Mason has done what she was asked to do: revealed the truth to Lucius, abandoned Orley Farm, and accepted banishment from her community. “But the burden had never been away—never could be away. Then she thought once more of her stern but just son, and as she bowed her head and kissed the rod, she prayed that her release might come to her soon.”<sup>109</sup> She prays for release—that is, for death—because her soul is no less troubled by her crime than before, and even her son has now abandoned her.

A Christian, as Shaffer reminds us, has faith that “the Ruler of the Universe is in charge, that fate is finally benign.”<sup>110</sup> But the meaning of “finally” is unclear. Though fate may be benign in the hereafter, it is not necessarily benign in this world, and if Mrs. Orme has ministered to Lady Mason's redemption, it is redemption that, for all Trollope knows, will take place only in the hereafter. That is how I read his profession of helpless ignorance at the end of his book about whether Lady Mason will ever experience repose again.<sup>111</sup> For those of us who accept Trollope's invitation to doubt that Lady Mason has sinned, Mrs. Orme has gambled and lost.

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108 2 *id.* at 105.

109 2 *id.* at 312. In a telling turn of phrase, Trollope had earlier called Lucius's justice the most odious virtue of them all. 2 *id.* at 276 (“Of all the virtues with which man can endow himself surely none other is so odious as that justice which can teach itself to look down upon mercy almost as a vice!”).

110 SHAFFER & SHAFFER, *supra* note 3, at 90.

111 See 2 TROLLOPE, *supra* note 9, at 312.

I have suggested that Trollope takes an agnostic stance about whether Lady Mason has sinned, and whether at the story's end she has been redeemed. I now wish to suggest that his stance is equally agnostic toward Mrs. Orme's ministry (and thus, I think, Trollope does *not* take the Christian side in the dialogue between Judaism and Christianity that he so elaborately sets up). The crucial scenes occur at the end of the book, after Lady Mason had been acquitted and Lucius has given back Orley Farm. Sir Peregrine Orme, heart-broken to the point of infirmity by Lady Mason's confession, conceives the hope that he could still salvage happiness from disaster by marrying Lady Mason. After all, he reflects, she has now been acquitted by the law, and by returning Orley Farm, she has righted the wrong she did twenty years before. Her legal and moral accounts are balanced. Sir Peregrine has forgiven her, and he knows that Mrs. Orme has as well. Without Lady Mason, he is certain that his life will be over in a matter of months; with her, his vitality would return, and Lady Mason would be rescued from exile and brought into a loving home.

It is Mrs. Orme, none other, who destroys his fantasy. "It would be wrong to yourself, sir. Think of it, father. It is the fact that she did that thing. We may forgive her, but others will not do so on that account. It would not be right that you should bring her here."<sup>112</sup>

At this point, Mrs. Orme is no longer speaking as a minister of souls. She is speaking as the voice of social propriety. Sir Peregrine "would offend all social laws if he were to do that which he contemplated, and ask the world around him to respect as Lady Orme—as his wife, the woman who had so deeply disgraced herself."<sup>113</sup> Theirs is a community of class, and it is the class of people for whom land matters more than character. Lady Mason has stolen real estate and tried to get away with it. For them, that is unforgivable, regardless of her legal acquittal and her reparations. Bringing Lady Mason into their society would be inappropriate.<sup>114</sup>

Sir Peregrine has shared his community's outlook for much of the time. He is a great and pure soul, but his views are the conven-

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112 2 *id.* at 307; see also 2 *id.* at 288 ("‘Yes, it is all over now,’ she said [to Sir Peregrine] in the softest, sweetest, lowest voice. She knew that she was breaking down a last hope, but she knew also that that hope was vain."). It is possible that Mrs. Orme's motivations at this point are not entirely pure or selfless. Without admitting it to herself, she may feel threatened by the possibility of being displaced as mistress of the estate by Lady Mason.

113 2 *id.* at 307.

114 I put it this way as a provocation, because Shaffer has written incisively on the shallowness of confusing appropriateness with morality. See generally Thomas L. Shaffer & Julia B. Meister, *Is This Appropriate?*, 46 DUKE L.J. 781 (1997).

tional views of his class. He regarded Lady Mason's deed as "great wrong—fearful wrong,"<sup>115</sup> "so base a crime";<sup>116</sup> and Lady Mason was "that terrible criminal,"<sup>117</sup> "so deep a criminal,"<sup>118</sup> "very vile, desperately false, wicked beyond belief, with premeditated villany, for years and years."<sup>119</sup> However, through his own Lear-like suffering, Sir Peregrine has now achieved a glimpse past the prejudices of his class to a vision of redemption through love, redemption for both Lady Mason and himself—until Mrs. Orme brings him to his senses and makes him see how childish his vision is. She conceives it to be her duty to tell him that there will be no renewed vitality for him, "no Medea's caldron from which our limbs can come out young and fresh; and it were well that the heart should grow old as does the body."<sup>120</sup>

Trollope voices no judgment of Mrs. Orme, either directly or indirectly. Again and again in this book, he allows us to draw our own conclusions. The conclusion I draw is that Mrs. Orme is too willing to tolerate suffering so that the proprieties may be maintained—too willing to defer happiness to the world beyond, too credulous of the conventions of this world. If, as Shaffer says, Furnival is too eager to make things come out right, without suffering,<sup>121</sup> I fear that Mrs. Orme is not eager enough. And I fear that the very thing that makes her ministry so magnificent—her hope and faith in the world beyond—may lead her to devalue happiness in this world. Mrs. Orme may not be a model for a lawyer to emulate. Lawyers are given over to the business of this world.

#### X. TROLLOPE'S AMBIVALENCE ABOUT LAWYERS' ETHICS

That takes us, finally, back to Trollope's lawyers. Are any of them a model to emulate? Shaffer thinks that Trollope was scandalized by trial lawyers' disregard for the truth, so perhaps that means the answer is no.<sup>122</sup> I do not think this reading gets at the full Trollopean complexity, however.

To be sure, Trollope voices his outrage more than once, most powerfully when he describes Mr. Chaffanbrass:

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115 2 TROLLOPE, *supra* note 9, at 40.

116 2 *id.* at 46.

117 2 *id.* at 124.

118 2 *id.* at 126.

119 2 *id.* at 152.

120 2 *id.* at 307.

121 See SHAFFER & SHAFFER, *supra* note 3, at 90.

122 See *id.* at 88 n.9.

He was always true to the man whose money he had taken, and gave to his customer, with all the power at his command, that assistance which he had professed to sell. But we may give the same praise to the hired bravo who goes through with truth and courage the task which he has undertaken. I knew an assassin in Ireland who professed that during twelve years of practice in Tipperary he had never failed when he had once engaged himself. For truth and honesty to their customers—which are great virtues—I would bracket that man and Mr. Chaffanbrass together.<sup>123</sup>

This is one of the few places where Trollope speaks about the lawyers in his own voice. He does it again when he describes “five lawyers . . . , not one of whom gave to the course of justice credit that it would ascertain the truth, and not one of whom wished that the truth should be ascertained.”<sup>124</sup> Trollope continues,

Surely had they been honest-minded in their profession they would all have so wished;—have so wished, or else have abstained from all professional intercourse in the matter. I cannot understand how any gentleman can be willing to use his intellect for the propagation of untruth, and to be paid for so using it.<sup>125</sup>

But Trollope is of two minds. In *Orley Farm*, the foil to the lawyers is Felix Graham, who thinks that law should be about truth, and to whom Chaffanbrass represents “all that was most disgraceful in the profession.”<sup>126</sup> The American legal ethicist Henry Drinker, in his introduction to the 1950 edition of *Orley Farm*, described Felix as “Trollope’s early idea of the perfect barrister.”<sup>127</sup> If Trollope really meant to condemn conventional lawyers’ ethics, Drinker might be right. But that is not how Trollope wrote *Orley Farm*.

Trollope introduces Felix Graham as “the English Von Bauhr.”<sup>128</sup> Von Bauhr is a German legal scholar, a stupifyingly tedious proceduralist who criticizes the British legal system in a three-hour speech at a conference on law reform.<sup>129</sup> Trollope does not tell us much about Von Bauhr’s views, but if Felix Graham is the English Von Bauhr, they amount to a rejection of adversarial ethics: “Let every law-

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123 2 TROLLOPE, *supra* note 9, at 277–78.

124 2 *id.* at 128.

125 2 *id.* For a similar sentiment, see 1 *id.* at 91.

126 2 *id.* at 57.

127 Henry S. Drinker, *Introduction* to ANTHONY TROLLOPE, *ORLEY FARM*, at vii (Alfred A. Knopf ed., 1950).

128 1 TROLLOPE, *supra* note 9, at 137.

129 1 *id.* at 130–32.

yer go into court with a mind resolved to make conspicuous to the light of day that which seems to him to be the truth."<sup>130</sup>

What does Trollope think of this theory? In one remarkable scene, he shows us Von Bauhr in his hotel room after his speech, napping and dreaming. Von Bauhr dreams of "an elysium of justice and mercy,"<sup>131</sup> an elysium as orderly "as a beer-garden at Munich," an elysium in which a grand pedestal stands, on which "was a bust with an inscription:—'To Von Bauhr, who reformed the laws of nations.'"<sup>132</sup> Trollope comments, "It was a grand thought; and though there was in it much of human conceit, there was in it also much of human philanthropy."<sup>133</sup>

Trollope is gentle, but he leaves little doubt that Von Bauhr is ridiculous. All his reforms, summarized in the dry, unintelligible pamphlet with which he anesthetizes the law-reform congress, are the product of pure theory untouched by human life and untempered by human judgment. In *Orley Farm*, we must realize, Germany represents a kind of theory-besotted Cloud Cuckooland, the antipodes of sound British judgment. Lucius Mason studied at a German university, and came back a conceited, scholarly fool. He lectures to his mother about how he will improve the yield of Orley Farm by fertilizing it scientifically, with expensive, high-quality, imported guano.<sup>134</sup> When Lady Mason expresses concern that he will be ruining his fields and wasting his capital, he loftily dismisses the importance of capital, "speaking on this matter quite *ex cathedra*, as no doubt he was entitled to do by his extensive reading at a German university."<sup>135</sup> Germany is where they fill your head with expensive, high-quality, imported guano. That, I think, expresses Trollope's judgment about the theories of Von Bauhr and those of Felix Graham.

That leaves Trollope in a stand-off. On the one hand, he clearly despises the "unique, novel, and unsound adversary ethic" by which lawyers grant themselves moral immunity for whatever they do to defeat the truth.<sup>136</sup> But Trollope shows no more mercy for the German

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130 1 *id.* at 141.

131 1 *id.* at 136.

132 1 *id.*

133 1 *id.*

134 1 *id.* at 19.

135 1 *id.*

136 Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 *passim* (1988) (arguing that the adversary ethic is a recent and unsound development, which lawyers use to shield themselves from morality). When Chaffanbrass offers his own self-justification, Trollope takes care to make it half-contemptible.

inquisitorial alternative.<sup>137</sup> And he has no sympathy for Graham's legal ethics of truthfulness, because it comes from a theory that has nothing to do with the world in which real people actually live. When Graham argues according to his theory in Lady Mason's trial, Trollope portrays him as a feckless failure.<sup>138</sup> Trollope's dilemma is one that many of us share. He dislikes the way lawyers defeat truth, and he rejects their rationalizations, but he grudgingly admits that the job they do is an important one and that the way they do it may sometimes be what the job requires.

And what of Mr. Furnival, the central legal interest of the story? Trollope paints him as a lawyer with great powers of discernment in practical matters, and no powers of discernment in his own life—no powers to see how infatuated he has become with Lady Mason, or how badly he is botching his own marriage, or what a calculating, dishonest girl his daughter has grown up to be, or how callous he is to his clerk. Like Chaffanbrass, Furnival is not a pretty sight to behold. If there is any lesson in the figure of Furnival, it is how deeply specialized and disconnected from the rest of life professional excellence can be, even excellence in a field like law that requires careful judgment of other people.

Shaffer thinks worse of him than that, however. Shaffer thinks that he fails even as a lawyer by dodging the truth and trying to make things work out well for Lady Mason. The heart of his criticism is this: "Furnival, as we say, got Lady Mason off; but he could not find a way to help Lady Mason to peace in her guilt or to reconciliation with her family and her community."<sup>139</sup> And again, "Thomas Furnival, barrister, saved Lady Mason from the pain and the promise of being reconciled to her neighbors."<sup>140</sup>

I find the criticism puzzling, however. Mrs. Orme could not find a way to help Lady Mason to peace in her guilt or to reconciliation with her family and her community either. If Furnival pressed Lady

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I can look back on life and think that I've done a deal of good in my way. I've prevented unnecessary blood-shed. I've saved the country thousands of pounds in the maintenance of men who've shown themselves well able to maintain themselves [i.e., thieves]. And I've made the Crown lawyers very careful as to what sort of evidence they would send up to the Old Bailey.

2 TROLLOPE, *supra* note 9, at 169–70.

137 See 1 TROLLOPE, *supra* note 9, at 91 (describing "the great practitioners from Germany, men . . . who believe in the power of their own craft to produce truth, as our forefathers believed in torture; and sometimes with the same result").

138 2 *id.* at 223–24.

139 SHAFFER & SHAFFER, *supra* note 3, at 88.

140 *Id.* at 93.



Mason as Mrs. Orme pressed her, her defense would collapse and the result would be prison. How would that reconcile her to her neighbors, who shun her even after she is acquitted? In the story as it actually unfolds, it is Mrs. Orme's course of action, not Mr. Furnival's, that banishes Lady Mason from her community and separates her from her son. Furnival at least had a plan for restoring Lady Mason to her community. Admittedly, it was a plan to restore her on untruthful terms, but they were terms that she had found acceptable for twenty years.

Shaffer is right to this extent: at the end of the novel, only Lady Mason's truthfulness wins forgiveness from Sir Peregrine. Truthfulness reconciles Lady Mason to him—but the cost is that they will never see one another again. And there is little doubt that if Lady Mason had told the truth at the beginning of the novel, Sir Peregrine and Mrs. Orme would not have admitted her to their company in the first place. Truthfulness exacts a terrible toll, and I have argued that Trollope never tells us whether the price was worth paying. Perhaps he did not want to scandalize his Christian readers with the thought that Rebekah may have been right.

#### XI. TRUTHFULNESS OR COMMUNITY?

Jews do not believe that communities invariably require truthfulness. In the biblical story, a family, a family of families, a people, is founded on Rebekah's lie. As I have described the Hebrew Bible, it shows us how communities can grow out of moral imperfections. It shows us that moral imperfections do not necessarily poison everything.

Shaffer, I think, believes that communities do require truthfulness. I often teach one of his finest essays, *The Legal Ethics of Radical Individualism*,<sup>141</sup> which he organizes around a husband-and-wife estate-planning dilemma. In it, a lawyer learns that Mary, the wife, has concealed from her husband John her true wishes about what bequests their will should make.<sup>142</sup> She conceals them because she wants to avoid conflict with John.<sup>143</sup> Now that the lawyer has surfaced the conflict, a messy conflict of interest arises; but Shaffer argues that the lawyer's probing inquiry into deep family issues is a morally good act. "The estate planning issue . . . is whether this family is equal to the truth of what it is. The legal ethics issue is whether this lawyer,

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141 Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

142 *Id.* at 968.

143 *Id.*

employed by this family . . . , is to continue to have anything to do with the truth of what this family is."<sup>144</sup>

But what if the family is not equal to the truth of what it is? When I teach Shaffer's essay, I pose some additional facts to my students: Before John and Mary knew each other, Mary had a child out of wedlock and placed it for adoption. She never told John. Now, she would like the child to receive a bequest, but she fears that raising the issue after so many years would destroy her marriage.

She may well be right. Friends who are family therapists tell me that family secrets pervade their practice, and the families do not always survive disclosure. That is a hard truth, but an even harder truth is that families where members do not disclose secrets sometimes thrive. That makes it a genuine question whether the therapist or lawyer should press the family to discover whether it is equal to its own truth. I am unsure how Shaffer would answer the legal ethics question on the melodramatic facts I pose. It seems to me that they are very similar to the facts of *Orley Farm*. But I suspect that even here he favors truthfulness, just as he favors truthfulness in *Orley Farm*.

Like my therapist friends, I have my doubts. In the best of all possible worlds, Mary tells John about her child, and, after the shock has subsided, they work out of the crisis with their marriage stronger and more truthful. But people have weaknesses, and sometimes good people have terrible weaknesses, and love does *not* conquer all. The best of all possible worlds may not be available *to these two people*. That leaves two alternative futures. In one, Mary tells John about the baby, and he cannot deal with the truth. After two tumultuous years they divorce. It should not be that way; John and Mary should be able to rise to the truth of what their family is. But that is the way it is.

In the other alternative future, the lawyer agrees with Mary to let it drop. He draws up a will that includes no bequest to Mary's child, and she signs the will. John and Mary go to their graves after fifty years of marriage in which Mary never tells John about the baby. Their lives and deaths are flawed: John dies deceived, and Mary dies without leaving money to her child. But they live and love together, and they do not die alone.

It is far from obvious which of these is least bad. Therapists and lawyers must reflect deeply on whether they will place their faith in truthfulness, like Shaffer and Mrs. Orme; or whether, like Mr. Furnival, they will try to practice the art of the possible (knowing that what is possible may be morally disappointing). If I read Shaffer aright, he thinks professionals should take the first course. The lawyer

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144 *Id.* at 979.

should have faith in John and Mary, faith that they can rise to the truth. That entails, however, that Shaffer must be prepared to accept the first alternative future, where the marriage founders, over the second, where the marriage succeeds on false terms. And he thinks that Furnival should have faith that Lady Mason and Lucius can rise to the truth. But that entails a willingness to accept the bitter ending of *Orley Farm* over the alternative that Furnival planned, in which Lady Mason wins acquittal, retains the farm, and never tells the truth to Lucius.

In both cases, I incline the other way. My reason for inclining the other way is that lawyers, like therapists, have a responsibility to abjure wishful thinking, and when faith flies in the face of evidence, it becomes practically indistinguishable from wishful thinking. Shaffer denies this: he writes that "the virtue of hope can come to terms with and deal truthfully with the certainty that the moral life will cause others to suffer."<sup>145</sup> But if the suffering of others is a *certainty*, where is the hope? Shaffer's answer is one we have seen before: "Hope . . . says that the Ruler of the Universe is in charge, that fate is finally benign . . . ."<sup>146</sup> Hope is extra-worldly.

Judaism is a this-worldly religion. A few years ago, a Christian friend asked me what Jews believe about the afterlife, and I had to admit that I did not know. I called my father and asked him whether we believe in an afterlife. He did not know either. He called a friend who has studied a lot of Judaism, but his friend was unsure. Officially, Jews believe in the resurrection of the dead when the Messiah comes, and we recite a statement of that belief near the beginning of the Eighteen Blessings; and the rabbinic literature is filled with folk-tales about paradise and hell, Eden and Gehinnom. But these beliefs are quite peripheral to the religion. "Whatever may be the doctrine of heaven and hell, the central emphasis of Judaism has remained on this world, from the beginning."<sup>147</sup> Abraham's great act of faith, the sacrifice of Isaac, was redeemed in this world rather than the next; so was the faith of Job. A Jewish reader, I think, will look with greater sympathy than Shaffer on Furnival's effort to make things come out right in this world—and with little sympathy on Mrs. Orme's final decree against Sir Peregrine's and Lady Mason's earthly happiness.<sup>148</sup> I have been arguing that this is a fair reading of Trollope's novel.

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145 SHAFFER & SHAFFER, *supra* note 3, at 90.

146 *Id.*

147 ARTHUR HERTZBERG, JUDAISM: THE KEY SPIRITUAL WRITINGS OF THE JEWISH TRADITION 277 (rev. ed. 1991).

148 Shaffer thinks that Furnival was "so wrong about [his ability to make things come out well] as to have been out of touch with reality . . . ." SHAFFER & SHAFFER,

Furnival, Chaffanbrass, and Aram are unattractive instruments of salvation, but it seems to me that Rabbi Trollope leaves us with the possibility that God works through unattractive instruments. As usual, there is a Jewish joke on the subject.

After many days of hard, continuous rain, the river is in danger of flooding, and word goes out that people may have to abandon their homes. When the river crests, water pours through the town, inundating houses, and it continues to rise. Firemen are sent in a small motorboat to go through the streets to make sure everyone is leaving. When they come to the house of the rabbi, they find him standing knee-deep in water on his front porch.

"Come on, Rabbi," say the firemen. "The river will go much higher, and you should leave with us."

"No," says the rabbi. "God will protect me." And he sends them away.

The river rises higher, the rabbi is forced to go up to the second floor of his house, and now the police come in a motor launch.

"Come on, Rabbi," say the police, "there isn't much time."

"No," insists the rabbi. "I will stay right here. God will look after me." And he sends them away.

Now the river rises so high that the rabbi is forced to stand on the roof of his house. When the National Guard arrive in a large boat, telling him that the river is sure to go even higher, the rabbi says, "All my life I have been a man of faith, and I will stay now, and trust in God," and sends them away.

The river rises, the rabbi is swept away, and the rabbi drowns.

Forthwith the rabbi appears in heaven, where he angrily approaches the throne of God, demanding, "How can You have let this happen to me? For all my life I have kept Your *mitzvot*. I have done what You asked, and trusted in You. Why?"

A voice sounds from the throne: "You shmuck. I sent three boats."<sup>149</sup>

Sometimes, perhaps, God sends three lawyers.

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*supra* note 3, at 89–90. I do not see why. If Sir Peregrine had not proposed marriage to Lady Mason, precipitating her confession, Furnival's plan might have worked.

149 TED COHEN, JOKES: PHILOSOPHICAL THOUGHTS ON JOKING MATTERS 19–20 (1999).

